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CHARLES ELMORE CRO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 611

THE IVANHOE BUILDING & LOAN ASSOCIATION OF NEWARK, N. J.

Petitioner

against

THOMAS A. ORR, TRUSTEE OF EASTERN SASH & DOOR COMPANY, Bankrupt

Respondent

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Supplemental Brief for the Respondent, Thomas A. Orr, Trustee of Eastern Sash & Door Company, Bankrupt

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ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Supplemental Brief for the Respondent, Thomas A. Orr, Trustee of Eastern Sash & Door Company, Bankrupt.

This supplemental brief is filed pursuant to leave granted by the Court upon the oral argument on April 5, 1935.

Nature of Petitioner's Claim.

If the assuming grantee (the bankrupt) had not been adjudicated a bankrupt but on the contrary was a live going concern, the petitioner would have neither right nor remedy *at law* for the recovery of the deficiency arising out of the foreclosure. Petitioner's remedy against the assuming grantee is purely an equitable one. There is no privity between the creditor mortgagee and the assuming grantee. The creditor mortgagee could pursue the assuming grantee only through the original obligor grantor and in the State of New Jersey, where the Court of Chancery which administers equity is separate and distinct from the Courts of Law, the petitioner's sole forum would be in the equity court, and then only in accordance with "the ancient and familiar doctrine in equity that the creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt." *Green* v. *Stone*, 54 New Jersey Equity 387.

> "A deed inter partes whereby an estate is conveyed, if accepted by the grantee, is in legal effect the deed of both parties, and a stipulation in such a deed by the grantee that he will assume and pay a debt secured by a mortgage on the premises for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor to pay the mortgage debt, especially where the mortgage debt is computed as part of the consideration money for the conveyance. This contract is with the grantor for his indemnity, and the obligation of the grantee to pay the debt enures in equity for the benefit of the mortgagee, *and he may enforce it against the grantee to the extent of the unpaid part of the mortgage debt remaining due after the proceeds of the mortgaged estate have been applied thereon.*" (Italics ours.)

Green v. *Stone, supra,* and cases cited therein; *Holland Reform School Society* v. *De Lazier,* 85 N. J. Eq. 497; *Reeves* v. *Cordes,* 108 N. J. Eq. 469, 155 Atlantic 547; *Feitlinger* v. *Heller,* 112 N. J. Eq. 209, 164 Atlantic 6; *Uptown B. & L. &c.* v. *Leff,* 112 N. J. Eq. 543, 165 Atlantic 118; *Fisk* v. *Wuensch,* 115 N. J. Eq. 391, 171 Atlantic 174; *Keller* v. *Ashford,* 133 U. S. 610.

The point we desire to emphasize is that petitioner's claim is essentially equitable in its nature and in New Jersey could be enforced, if at all, only in a court of equity. Hence the petitioner by filing its claim has invoked the equitable jurisdiction and powers of the Bankruptcy Court and is bound by the fundamental equitable maxims that "he who seeks equity must do equity" and that in the administration and liquidation of insolvent estates "equality is equity".

It has been stipulated in the case at bar that the fair value of the real estate against which petitioner has foreclosed and which has been reduced to petitioner's possession, is the sum of $9,000.00. The value of the property, in equity and good conscience, should be offset against the alleged deficiency and the petitioner should only be entitled to receive dividends on the *net* amount then remaining due.

The petitioner has title to the property and has, therefore, *in equity,* been paid the sum of $9,000.00. To permit petitioner to file its claim for the full amount and at the same time utterly disregard the value of the collateral which it has reduced to its possession and which is conceded to be worth $9,000.00, would in effect be granting to petitioner a preference over all other creditors of the bankrupt estate. Petitioner would then be receiving dividends on the sum of $9,000.00 which has already been paid to it.

The New Jersey rule regarding deficiency judgments after foreclosure.

The first case to enunciate the rule regarding deficiency judgments in the State of New Jersey during the present economic emergency is the case of *Federal Title & Mortgage Co.* v. *Lowenstein*, cited on page 7 of respondent's original brief. The doctrine of this case has been followed in the following New Jersey cases: *Fifth Ave. Bank of N. Y.* v. *Compson*, 113 N. J. Eq. 152; *Baader* v. *Mascellino*, 113 N. J. Eq. 189; *United B. & L. Ass'n* v. *Neuman*, 113 N. J. Eq. 245; *Lurie* v. *Hockenjos*, 113 N. J. Eq. 504, aff. 115 N. J. Eq. 304; *Federal Realty Co.* v. *Fidelity Corp. of N. J.*, 113 N. J. Eq. 356; *Chasey* v. *Broadway Holding Co.*, 114 N. J. Eq. 74; *Better Plan B. & L. Ass'n* v. *Holden*, 114 N. J. Eq. 537; *Fruzynski* v. *Phillips*, 114 N. J. Eq. 23; *Keer* v. *N. J. Title Guarantee, &c., Co.*, 115 N. J. Eq. 388; *Meranus* v. *Lawyers & Homemakers B. & L. Ass'n*, 116 N. J. Eq. 402, 174 Atlantic 150; *Maher, et als.* v. *Usbe*, 116 N. J. Eq. 398, 174 Atlantic 159; *Fisk* v. *Wuensch, supra; Fruzynski* v. *Jablonski*, 117 N. J. Eq. 117; *Young* v. *Weber*, 117 N. J. Eq. 242, 175 Atlantic 273.

The extent to which the New Jersey Court of Chancery has gone in cases involving deficiencies after foreclosure and in invoking the maxim "he who seeks equity must do equity" is strikingly illustrated in the case of *Baader* v. *Mascellino, supra*, where the Court of Chancery of New Jersey refused to set aside a fraudulent conveyance unless the creditor mortgagee as a condition precedent to his obtaining equitable relief, should credit against the deficiency the fair value of the premises. The Court followed the doctrine of the case of *Federal Title & Mortgage Co.* v. *Lowenstein, supra.*

The same doctrine has been applied by the Equity Courts of New Jersey for the benefit of assuming grantees. *Better Plan B. & L. Ass'n* v. *Holden, supra; Fisk* v. *Wuensch, supra,*

The foregoing rule, as applied in the Equity Courts of New Jersey, was created by statutory enactment, for application in the *Courts of Law,* but this statute was held unconstitutional as being repugnant to and in violation of the Constitution of the United States, with respect to pre-existing contracts. *Vanderbilt* v. *Brunton Piano Co.,* 111 N. J. L. 596.

Conclusion.

The petitioner filed its claim as an unsecured creditor. If bankruptcy had not intervened, the petitioner could only have sued the bankrupt concern in a court of equity and then only for the balance of the deficiency after deducting the fair value of the premises. By filing its claim with the Referee in Bankruptcy, the petitioner has in effect asked the Court of Bankruptcy to ascertain the amount of the deficiency as against the Bankrupt. This the Court of Bankruptcy has done. **Should the petitioner be entitled to any greater right after bankruptcy than it had before?** The question of whether or not the petitioner was a secured or unsecured creditor is quite beside the point as we see it. The Court of Bankruptcy has determined the amount of petitioner's claim against the bankrupt "according to the equities of the case" as it is empowered to do under Section 57K of the Bankruptcy Act, and in doing so, has applied the rules of equity clearly applicable to such situations.

It is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

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SYDNEY L. JACOBS,
On the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 611.—October Term, 1934.

The Ivanhoe Building & Loan Association of Newark, N. J., Petitioner,
vs.
Thomas A. Orr, Trustee of Eastern Sash & Door Company, Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 29, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

In this case the question is whether a creditor of a bankrupt, who has recovered a portion of the debt owed him by foreclosure of a mortgage on property not owned by the bankrupt, may prove for the full amount of the debt, or only for the balance required to make him whole.

The owners of real estate in Newark, New Jersey, executed to the petitioner a bond in the penal sum of $23,000, conditioned for the payment of $11,500, secured by a mortgage on the land. The mortgagors subsequently conveyed the premises to the Eastern Sash and Door Company, which expressly assumed the mortgage debt. That company afterward conveyed to one Yavne. A default occurred and the petitioner filed a foreclosure bill against Yavne. The amount due was found to be $10,220.96, with interest and costs. The property was sold by the sheriff and bid in by the petitioner for $100. Meanwhile the Sash and Door Company had been adjudicated a bankrupt. The petitioner presented a claim against the estate for $10,739.94, the amount then due on the bond less the $100 bid at the sale. It was stipulated that the mortgaged property acquired in foreclosure was worth $9,000. The referee reduced the claim to the difference,—$1,739.94,—and ruled the petitioner was not entitled to prove for any greater sum. The District Court and the Circuit Court of Appeals have held the referee's ruling was right.[1] The result appearing to be contrary to the weight of authority[2] we granted certiorari.[3]

[1] 73 F. (2d) 609.
[2] Rule 38, § 5 (b).
[3] 294 U. S. —.